HIGH COURT OF UTTARANCHAL AT NAINITAL

(Court's order whether the case is or not approved for reporting.)

(Chapter VIII Rule 32 (2)(b)

Description of the case.

W.P. No. 925 (SS) of 2001
Nb. Ramesh Chandra

Vs.
Union of India and others.

Approved for reporting.

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~~Not approved for reporting~~

Date of decision 26.4.2004

Initial of Judge

HIGH COURT OF UTTARANCHAL AT NAINITAL

Writ Petition No. 925(S/S) of 2001

Nb.Subedar Ramesh Chandra S/o
Shri Ganga Ram R/o Village Gadla,
Post-Kanhaura, District Rewari (Haryana) …….Petitioner

Vs.

1. The Union of India through Secretary,
   Ministry of Defence, Govt. of India, New Delhi.
2. Chief of the Army Staff, Army Head Quarter, New Delhi.
3. Commanding Officer 23 Wireless
   Experimental Unit C/O 56 APO.
4. Sub. Maj. L.S. Mahra 23 Wireless
   Experimental Unit C/O 56 APO.

……..Respondents

Mr. C.D.Bahuguna, learned counsel for the petitioner
Mr. Prakash Bisht, learned counsel for the respondents

Hon'ble Rajesh Tandon J.

Heard the learned counsel for the parties.

By the present writ petition the petitioner has prayed for the issue of a writ of mandamus directing the respondents to dispose of the Statutory Complaint of the petitioner and to promote him to the rank of Subedar with effect from 12.7.2000 and to the rank of honorary Captain as and when it is due.

Brief facts giving rise to the present writ petition are that the petitioner was initially enrolled in the Indian Army in the year 1975 as recruit and was promoted to the rank of Naik, Lance Naik, Hawaldar, Hawaldar Major. He was further promoted as Naib-Subedar in 23 Wireless Experimental Unit. The petitioner efficiently discharged the duties of Naib-Subedar and that is why he enrned good Annual Remarks in the year 1995, 1996 1997 and 1998 and the same were entered in his Service Book. The next Annual Confidential entry/remark was scheduled to be entered in his Service Book in June 1999 and was required to be forwarded to the Signal Records (Signal Abhilekh Karyalaya) duly completed in all respects.

Lt.Col.S. Vishwanathan of the 23 Wireless Experimental Unit, being Commanding Officer of the Unit prepared ACR of the petitioner for the period 24 Aug. 1998 to 31 May 1999 and awarded Adverse Remark/weak point to him on 13 June 1999.

The petitioner has submitted that as per relevant Army Order/Instructions the Adverse Remark was to be communicated to the petitioner within 30 days from the date of endorsement and then only it could be forwarded to the Signal Records but the Commanding Officer having some grudge with the petitioner did not communicate the same to him and forwarded the Adverse Remark of the ACR of the petitioner to the Signal Records, Jabalpur (MP) vide letter No.

0202/A/01/149 dated 14 Aug.99 for entering the same in the Service Records. The Signal Records, Jabalpur vide letter dated 23 Aug. 1999 returned the ACR of the petitioner to the 23 Wireless Experimental Unit with a direction to forward the same after getting the ACR signed from the employee, which is apparent on perusal of Annexure-C.A.-2 to the counter affidavit.

Petitioner has further submitted that as per Sub-para. 1 (e) of the Army Head quarter Letter No. 48854/O.R.G. (1 of R) (a) dated 8-10-1991, the adverse remark / weak point if not communicated within 30 days to the employee, the adverse remark / weak point would stand expunged.

Lt.Col. S. Vishwanathan of the 23 Wireless Experimental Unit communicated the following Adverse/Weak points to the petitioner on 10 Sept. 1999 Vide letter dated 10 Sept 1999 to the following effect:

> *" A low average JCO is self centered and sets a poor example of Jr leadership."*

The learned counsel for the petitioner made the following submissions

(i) Since the Adverse/weak points was not communicated to the petitioner within 30 days from the date of its endorsement in the Unit Record in terms of Sub-para. 1 (e) of the Army Head quarter Letter No. 48854/O.R.G.(1 of

R) (a) dated 8-10-1991, the adverse remark / weak point awarded to the petitioner stood expunged. But despite that the adverse remark/weak point was entered in the Service book of the petitioner.

(ii) When the petitioner came to know about adverse remark in Sept. 1999, he made an application on 27th Sept, 1999 to the Deputy Director, Signal Intelligence, Central Zone Lucknow and requested for personal interview. The application was accepted and an interview was held on 28 Sept. 1999 and in the interview the petitioner disclosed as to how he has been harassed and humiliated and also informed that adverse remark dated 13.6.1999 has been entered in his Service book. Thereafter Major Gurmohan Singh on 23 Wireless Experimental Unit, vide letter no 0207/A/01 dated 02 Oct. 1999 directed the petitioner to forward a Non-Statutory Complaint regarding his grievances, which is apparent on perusal of Annexure R.A-2 to the rejoinder affidavit.

(iii) Pursuant to the said letter of the department, the petitioner submitted a Non-Statutory Complaint regarding his grievances to the commanding officer on 09 Oct. 1999, seeking the relief to the effect that the ACR of 1999 of the

petitioner may be reviewed fairly so that he could not become victim of indifferent circumstances. The 23 Wireless Experimental Unit refused to accept the Non-Statutory Complaint and then the petitioner had to send the same by registered post to the Central Zone, Lucknow on 23.10.1999. The petitioner waited for reply of the Non-Statutory Complaint but to no avail.

(iv) When no action could be taken on the Non-Statutory Complaint for several months, then the petitioner submitted a Statutory Complaint on 16 June, 2000 under para. 4 and 5 of the Army Order 1/99.

The learned counsel for the petitioner has referred Section 26 of The Army Act, 1950 as also provisions of Army Order 1/99,which enabled him to submit Statutory Complaint. A copy of Army Order 1/99 is enclosed as Annexure-4 to the rejoinder affidavit.The relevant portion of para. 4 and 5 of the Army Order 1/99 are reproduced below:

" 4. Non-Statutory Complaint in normal course will be finally disposed off by the officer two step superior to the one who is allowed to have caused grievance. However, Army Cdr will be the final authority for disposal of non-statutory complaints. ***Therefore, it is incumbent on JCOs and OR to***

address their complaints as statutory where they wish to such redressal at the highest level i.e. the COAS. *Non-statutory complaints can be submitted without prejudice to the right to submit a statutory complaint if the complainant is not satisfied.*

5.Any JCO and OR can complaint to he COAS by way of a statutory complaint on any matter under the provisions of AA Sec 26 when he deems himself wronged by any superior or other officer or against the direction of any authority disposing off a case under Sec 80, 83, 84 or 85 as the case may be"

(Copy of Army Order-1/99—Annexure-R.A.4)

In the Statutory Complaint, the petitioner in the column – **'Redress sought'** , prayed for the following reliefs:

(a) My ACR for the period 24 Aug. 1998 to 31 May 1999 may be compared with the earlier profile and be quashed and set aside being inconsistent in view of the facts and circumstances as explained in para.6 above.

(b) After setting aside the aforesaid ACR my name kindly be considered by the DPC for promotion to the rank of Subedar on the basis of my previous ACRs from 1995 to 1998 along with my batch mates.

The 23 Wireless Experimental Unit vide letter dated 25 June 2000 returned the Statutory Complaint dated 16 June 2000 to the

petitioner with a direction to re-submit the same after complying with certain formalities. The petitioner re-submitted the Statutory Complaint date 16 June 2000 on 30 June to the 23 Wireless Experimental Unit after completing required formalities and it is admitted to the respondents. the respondents have themselves enclosed, a copy of letter of the petitioner dated 30 June, 2000, as Annexure-C.A.-12 along with the Counter-Affidavit by which the Statutory Complaint was re-submitted to the 23 Wireless Experimental Unit.

The 23 Wireless Experimental Unit forwarded the Statutory Complaint of the petitioner to the **"Complaint and Advisory Board (CAB), Head Quarters, New Delhi"** vide letter dated 07 July 2000. and the **"Complaint and Advisory Board (CAB), Head Quarters, New Delhi"** vide letter dated 01 August 2000 has acknowledged the receipt of the Statutory Complaint of the petitioner and the petitioner has been allotted a Complaint no. SO-46900. Similarly the 23 Wireless Experimental Unit has also informed vide letter dated 16 Sept 2000 to the petitioner that his Statutory Complaint has been acknowledged by the CAB, for COAS Sectt. (Chief of the Army Sections.) Army Head quarter, New Delhi.

1. The respondents in para. 16, 17, and 18 of the Counter affidavit have admitted the factual position regarding submission of

Statutory complaint, its forwarding to the Head Quarter and its acknowledgment. The relevant paragraphs are reproduced as under:

"16. That the petitioner re-submitted his Statutory Complaints on 30 June, 2000. true Photostat copy is being filed as Annexure CA-12 to this Affidavit.

17.That, the unit has forwarded the statutory complaint of the petitioner to the complaint and Advisory Board Army H Qr South Block, New Delhi-11, by Capt. R.M. Pandey by means of a letter dated 7 July, 2000. A True Photostat copy of the letter dated 7 July, 2000 is filed as Annexure CA-13 to this Affidavit.

18. That, the Complaints & Advisory Board by means of a letter dated 01-08-2000, acknowledged the complaint of the petitioner and it was allotted No.- S046911. A true copy of the above acknowledgment by the Board is being filed as Annexure CA-14 to this Affidavit."

The petitioner has stated in the writ petition that due to the adverse remark entered in the service book of the petitioner, his promotion to the rank of Subedar has been withheld and the persons junior to him have been promoted. The relevant paragraph no. 13 and 14 of the writ petition are reproduced to below:

"13. That to the utter surprise to the petitioner. The statutory complaint as well, has not been disposed of by the authorities concerned nor the bogus adverse remark has been expunged; and without looking into the previous record of the petitioner the promotion of the petitioner to the rank of Subedar has been with held so far, ***and persons*** *junior to him have been promoted which is violative of the fundamental right of the petitioner guaranteed under Article 14 and 16 of the Constitution of India.*

14. That Jawahar Lal and many others Juniors to the petitioner have been promoted with effect from 12-07-2000 and the promotion of the petitioner has been with held on the basis of bogus adverse entry for a short period ranging from 24 of Aug. 1998 to 31 May 1999. Ignoring all his previous record and closing the avenue for promotion for future promotion up to the rank of hounarary captain causing irreparable loss and injury besides financial loss to the petitioner."

The learned counsel for the petitioner has submitted that adverse remark/weak point could not have been acted upon by the department without deciding the Complaint of the petitioner and as such the decision of the department to promote junior to the petitioner

as Subedar during pendency of the complaint of the petitioner, without considering his candidature for promotion only due to the aforesaid adverse remark/weak point, is wrong and illegal. It is further submitted that it is a fundamental right of every Govt. employee to be considered for promotion as is provided under Article 14 and 16 of the Constitution of India.

In the case-**Dwarka Prasad Vs Union of India, reported in 2003(5) Supreme Today 166,** the Apex court has held that promotion being a fundamental right of a Govt. employee the same has to be considered. The relevant portion of para 9.of the judgment is reproduced to below:

> *"It is well established in law that the right to be considered for promotion on fair and equal basis without discrimination may be claimed as a legal and a fundamental right under Articles 14 & 16 of the Constitution."*

It is a settled law that endorsing adverse remark/weak point in the ACR of any employee is not termed as punishment to the employee. Punishment is awarded only after disciplinary Inquiry. Since a right to be considered for promotion is a fundamental right, such right can not be extinguished by mere adverse remark / weak point of any particular year. It is settled law that for purpose of making promotion, over all assessment of the performance of the

preceding years of the employee is taken into consideration. Since the ACR of the petitioner for the immediately previous years. i.e. 1995, 1996, 1997 and 1998 have been good and satisfactory, as has been stated in para. 7 of the writ petition and since no material to the contrary has been brought on record through counter affidavit, there is no justification to deprive the petitioner of his legal and fundamental right to be considered for promotion on the basis of solitary adverse remark/weak- point of the year 1999.

Even in the case when any departmental proceeding is pending against any employee on some serious charges on the date of holding of DPC, the candidature of such employee for consideration for promotion cannot be denied and in that event, the Departmental Promotion Committee after considering the candidature of the employee for promotion, keeps the result of DPC for such employee in sealed cover; and in the case of exoneration of the employee from the charges in the Inquiry proceedings, sealed cover is opened and notional promotion is given to the employee retrospectively w.e.f. the date when junior to him has been given promotion. This **‘Seal Cover procedure’** has been approved and endorsed by the Apex Court in a number of decisions including the decision given in the case-**Union of India Vs. K.V. Janakiramanan, reported in 1991 (4) Supreme Court Cases-109.**

In the case-Brij Mohan Singh Chopra Vs. State of Punjab, reported in A.I.R. 1987 S.C. 948, the Apex court has held that unless an adverse report is communicated and representation, if any, made by the employee is considered, it cannot be acted upon to deny promotion. The relevant portion of the judgment is reproduced below:

"9.The question which falls for consideration is whether the aforesaid two entries could be taken into consideration in forming the requisite opinion to retire prematurely the appellant from service. There is no doubt that whenever an adverse entry is awarded to a government servant it must be communicated to him. The object and purpose underlying the communication is to afford an opportunity to the employee to improve his work and conduct and to make representation to the authority concerned against those entries. If such a representation is made it is imperative that the authority should consider the representation with a view a view to determine as to whether the contents of the adverse entries are justified or not. Making of a representation is a valuable right to a government employee and if the representation in not considered, it is bound to affect him service career, as in government service grant of increment, promotion and ultimately premature retirement all depend on the scrutiny of the service records. In Gurdial Singh Fijji V. State of Punjab ((1979) 3 SCR 518: (1979)

2 SCC 368 : 1979 SCC (L&S) 197 : 1979 Lab IC 1186) the appellant therein was denied promotion on account of certain adverse entries against which he had made representation to the government but for some reason or the other those representations could not be considered or disposed of. In view of those adverse entries, he was not selected for promotion. This Court while considering the effect of non-consideration of the representation observed : (SCCp. 376, para 17)

10.The principle is well settled that in accordance with the rules of natural justice, an adverse report in confidential roll, cannot be acted upon to deny promotional opportunities unless it is communicated to the person concerned so that he has an opportunity to improve his work and conduct or to explain the circumstances leading to the report. Such an opportunity is not an empty formality, its object, partially, being to enable the superior authorities to decide on a consideration of the explanation offered by the person concerned, whether the adverse report is justified. Unfortunately, for some reason or another, not arising out of any fault on the part of the appellant, though the adverse report was communicated to him, the government has not been able to consider his explanation and decide whether the report was justified.

11. After the aforesaid observation this Court directed the State Government to consider and dispose of the representation made by the appellant and thereafter the Selection Committee was directed to consider his case afresh.. In Amar Kant Choudhary V. State of Bihar ((1984) 2 SCR 299 : (1984) 1 SCC 694 : 1984 SCC (L&S) 173 : (1984) 1 LLN 249) the Court again emphasized that adverse report in confidential role cannot be acted upon to deny promotional opportunities unless it is communicated to the person concerned so that he has an opportunity to improve his work and conduct or to explain the circumstances leading to the report. Unless the representation against the adverse entry is considered and disposed of it is not just and fair to act upon those adverse entries. These decisions lay down the principle that unless an adverse report is communicated and representation, if any, made by the employee is considered, it cannot be acted upon to deny promotion.

In the case-Bal Kishan Vs Delhi Administration , reported in A.I.R. 1990 S.C. 100, the Apex court has held that No junior shall be confirmed or promoted without considering the case of his senior. The relevant portion of para.9of the judgment is reproduced below:

"9.In service, there could be only one norm for confirmation or promotion of persons belonging to the same cadre. No junior

shall be confirmed or promoted without considering the case of his senior. Any deviation from this principle will have demoralizing effect in service apart from being contrary to Article 16(1) of the Constitution."

Since the Statutory Complaint of the petitioner is pending disposal before the Chief of the Army Staff. The respondent no.2, is directed to decide the Statutory Complaint of the petitioner with a reasoned order within 4 weeks after the receipt of the certified copy of order. Since the petitioner is said to have now retired on superannuation, it is expected from the respondent no.2 to record a finding as to whether the petitioner is entitled for notional promotion. In case his Statutory Complaint is allowed, w.e.f. the date when any person junior to him has been promoted, the petitioner will be given consequential benefits of service forthwith.

Subject to these observations, the writ petition is disposed of. There will be no order as to costs.

(Rajesh Tandon J.)

Dated: 26.4.2004
*Dhyani